APPEAL NO. 021086
FILED JUNE 13, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on April 4, 2002. The hearing officer held that the appellant (claimant) did not sustain a repetitive trauma injury; that the date of her alleged injury was _____; that she did not give timely notice of the alleged injury to her employer and did not have good cause; and that although she was unable to work for a period of time due to her thumb condition, she had no disability because the injury was not compensable.

The claimant has appealed. As part of the appeal, the claimant contends that the hearing officer abused his discretion in admitting a transcribed interview with the claimant that had not been timely exchanged. The respondent (carrier) responds by reciting the evidence in favor of the decision.

DECISION

The hearing officer's decision and order are affirmed.

We will initially address the admission by the hearing officer of a transcribed interview between the adjuster and the claimant. It was undisputed that the interview was conducted with the claimant on January 24, 2001, but had not been transcribed until March 16, 2002, and was not exchanged with the claimant's attorney until April 1, 2002. The hearing officer admitted the transcript over the claimant's objection, indicating that he was influenced in his good cause finding by the fact that the interview was with the claimant and therefore she would not be surprised by her own interview. We agree that the hearing officer abused his discretion by allowing the transcribed interview into evidence.

The exchange requirement applies to "any witness statements." Section 410.160(3). The party who fails to disclose information "known to the party or documents that are in the party's possession, custody, or control at the time disclosure is required" may not introduce the evidence at a subsequent proceeding. Section 410.161. The Appeals Panel has long held that a "surprise" to the opposing party is not an element of whether late exchange should be allowed nor does lack of surprise equate to good cause for failure to exchange. Texas Workers' Compensation Commission Appeal No. 92110, decided May 11, 1992. The exchange of documents in a previous CCH will not excuse late exchange in a subsequent proceeding. Texas Workers' Compensation Commission Appeal No. 971201, decided August 11, 1997. The timely exchange of the name of a witness is not good cause for failure to timely exchange his/her written statement. Texas Workers' Compensation Commission Appeal No. 92108, decided May 8, 1992. Finally, the fact that a document was not created within 15 days after the benefit review conference (BRC) is not good cause for untimely exchange if the information contained in the statement is known at the time of the BRC. *See* Texas Workers' Compensation Commission Appeal No. 002366, decided November 27, 2000.

The carrier's attorney did not disagree that the tape of the interview had been in the possession of the carrier since its inception, nor could he explain why it was only transcribed fairly close to the CCH. There is no contention that the tape itself was ever exchanged. The Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) that was filed by the carrier on January 25, 2001, stated that the claimant "admitted in her recorded interview" that she felt her condition was work related in March 2000, although its position on this issue at the CCH was that medical records in March 2000 conferred the required knowledge. Under these circumstances, we cannot agree that there was good cause for the failure to exchange a statement in existence and known to the claimant for over a year prior to its eventual exchange.

However, this does not constitute reversible error about the date of injury nor change the outcome of the CCH, because the hearing officer found, and is supported by the evidence, that a compensable repetitive trauma injury was not proven. Although the claimant at first contended that her date of injury was _____, the date of a definite diagnosis related to her work, her testimony became equivocal on when she first knew that her injury may be related to her work. The hearing officer found that the claimant's report to her employer of an injury correlated more to when she was advised that her doctor would not accept group health insurance.

An appeals-level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this was the case here, and affirm the decision and order.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge